

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

ADALID MENDOZA,

Plaintiff,

v.

KILOLO KIJAKAZI,¹ Acting Commissioner
of Social Security,

Defendant.

Case No. 1:22-cv-00101-CDB (SS)

ORDER DENYING PLAINTIFF'S
MOTION FOR SUMMARY JUDGMENT;
GRANTING DEFENDANT'S CROSS-
MOTION FOR SUMMARY JUDGMENT

(Docs. 14, 16)

Plaintiff Adalid Mendoza ("Plaintiff") seeks judicial review of a final decision of the Commissioner of Social Security ("Commissioner" or "Defendant") denying his application for disability insurance benefits under the Social Security Act. (Doc. 1). The matter is currently before the Court on the parties' briefs, which were submitted without oral argument. (Docs. 14, 16). Upon review of the Administrative Record ("AR") and the parties' briefs, the Court finds and rules as follows.

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¹ Martin O'Malley became the Commissioner of Social Security on December 20, 2023. *See* Commissioner SSA, <https://www.ssa.gov/agency/commissioner/> (last visited September 11, 2024). Accordingly, Martin O'Malley should be substituted for Kilolo Kijakazi as the defendant in this lawsuit. *See* Fed. R. Civ. P. 25(d) ("An action does not abate when a public officer who is a party in an official capacity dies, resigns, or otherwise ceases to hold office while the action is pending. The officer's successor is automatically substituted as a party").

I. BACKGROUND

A. Administrative Proceedings and ALJ's Decision

On February 14, 2019, Plaintiff filed a Title XVI application for Supplemental Security Income (SSI) which alleged disability beginning January 1, 1993. (AR 81-83, 194-199). Plaintiff's claim was initially denied on June 11, 2019, and again upon reconsideration on November 15, 2019. (AR 91, 106). Plaintiff filed a request for a hearing before an Administrative Law Judge ("ALJ") on December 5, 2019. (AR 120-124). The ALJ, Mary Parnow, held the hearing on September 29, 2020, and Plaintiff appeared and testified. (AR 40-65).

The ALJ issued an unfavorable decision on December 7, 2020. (AR 17-39). After reviewing the evidence, the ALJ considered Plaintiff's claims using the five-step sequential evaluation required by 20 C.F.R. § 416.920(a). At step one, the ALJ found that Plaintiff had not engaged in substantial gainful activity since February 14, 2019, the date of the application. (AR 23). The ALJ further found that Plaintiff, in fact, had no past relevant work experience. (AR 33). At step two, the ALJ found that Plaintiff had the following severe impairments: Guillain-Barré syndrome, right knee patellar tendinitis, obesity, and bipolar disorder. (AR 23). The ALJ determined Plaintiff had some midfoot arthritis, cavovarus deformity, and positive tests for hepatitis C antibody reactivity but without indication that Plaintiff was symptomatic, as well as transient conditions of bilateral olecranon spurs and a triceps tendon tear, with little objective evidence they caused more than minimal functional limitation lasting twelve months or longer; none of these impairments were considered severe. The ALJ noted she did consider them in assessing the claimant's residual functional capacity. (AR 23).

The ALJ noted that Plaintiff had a documented history of numerous incarcerations, for charges including carrying weapons and high-speed chases. She concluded that this history was reasonably consistent with moderate difficulties in social interaction. The ALJ noted that Plaintiff's treating records documented a history of depressive symptoms, including feeling depressed, anhedonia, difficulty concentrating, fluctuating energy and appetite, and impulsive behaviors. The ALJ determined that Plaintiff's impulsive behavior, particularly in financial

1 decisions and sexual situations, were consistent with a medically determinable bipolar disorder.
2 (AR 27).

3 The ALJ ultimately determined that Plaintiff's medically determinable impairments
4 ("MDIs") do not cause more than a moderate limitation on Plaintiff's ability to perform mental
5 work activities. (AR 27). The ALJ reached this determination by considering the four broad
6 functional areas of mental functioning listed in the "Paragraph B" criteria.²

7 The first functional area is understanding, remembering, or applying information. The
8 ALJ found that Plaintiff has a moderate limitation. (AR 24). The ALJ supported her finding by
9 noting a wide range of daily tasks, found in the medical records, that Plaintiff could accomplish,
10 such as preparing simple meals, doing household chores, shopping in store and via computer,
11 going to the post office, and grocery store, and performing his activities of daily living without
12 assistance. (AR 28).

13 The next functional area is interacting with others. The ALJ found that Plaintiff has a
14 moderate limitation. (AR 24). The ALJ supported this determination by noting that Plaintiff
15 could engage in the following: living with and maintaining positive relationships with family and
16 long-term significant others, watching movies with his sister, maintaining at least some
17 friendships, understanding and following spoken instructions, and responding appropriately at
18 hearings and clinical appointments. (AR 28-29).

19 The third functional area is concentrating, persisting, or maintaining pace. The ALJ found
20 that Plaintiff has a mild limitation in this area. (AR 24). The ALJ cited Plaintiff's treating

21 ² The "paragraph B criteria" evaluates mental impairments in the context of four broad areas of
22 functioning: (1) understanding, remembering, or applying information; (2) interacting with others; (3)
23 concentrating, persisting, or maintaining pace; and (4) adapting or managing oneself. 20 C.F.R. § Pt. 404,
24 Subpt. P, App. 1. The severity of the limitation a claimant has in each of the four areas of functioning is
25 identified as either "no limitation," "mild," "moderate," "marked," or "extreme." *Id.* To satisfy the
26 paragraph B criteria, a claimant must have an "extreme" limitation in at least one of the areas of mental
27 functioning, or a "marked" limitation in at least two of the areas of mental functioning. *Id.* An "extreme"
28 limitation is the inability to function independently, appropriately, or effectively, and on a sustained
basis. *Id.* A "marked" limitation is a seriously limited ability to function independently, appropriately, or
effectively, and on a sustained basis. *Id.* A "moderate" degree of mental limitation means that functioning
in this area independently, appropriately, effectively, and on a sustained basis is "fair." *Id.* And a "mild"
degree of mental limitation means that functioning in this area independently, appropriately, effectively,
and on a sustained basis is "slightly limited." *Id.* See *Carlos v. Comm'r of Soc. Sec.*, 1:21-cv-00517-SAB,
2023 WL 1868870, at *4 n.7 (E.D. Cal. Feb. 9, 2023).

1 records, noting that Plaintiff could count change, use checkbooks or money orders, engage in
2 hobbies, exercise, watch TV for extended times, use a computer, and understand spoken
3 instructions. (AR 29).

4 The fourth functional area is adapting or managing oneself. The ALJ found that Plaintiff
5 has a mild limitation in this area. (AR 24). The ALJ noted that Plaintiff could present
6 appropriately at the hearing and at clinical appointments throughout the record, walk and do push-
7 ups, lift weights, engage in physical therapy, and handle daily stressors associated with his
8 condition and with changes in routine. (AR 29).

9 The ALJ extensively cited the primary mental health treating records in the file, the Kern
10 Behavioral Health and Recovery Services records (Exhibit 4F), in her discussion of her
11 “Paragraph B” findings. (AR 27-29). The ALJ determined that none of Plaintiff’s medically
12 determinable mental impairments caused more than moderate limitations in any of the “Paragraph
13 B” functional areas and that the severity of Plaintiff’s bipolar disorder impairments do not meet or
14 medically equal the criteria found in 20 C.F.R. Pt. 404, subpt. P, app. 1. (AR 24).

15 At step three, the ALJ found that Plaintiff’s severe impairments did not meet or equal any
16 of the per se disabling impairments listed in 20 C.F.R. Pt. 404, subpt. P, app. 1. The ALJ then
17 assessed Plaintiff’s residual functional capacity (“RFC”). The ALJ found that Plaintiff retained
18 the RFC to perform a reduced range of light work and simple tasks in a routine work
19 environment, with additional physical and postural limitations. (AR 24).

20 The ALJ acknowledged that while Plaintiff’s impairments could reasonably be expected
21 to cause his alleged symptoms, the ALJ found that Plaintiff’s statements concerning intensity,
22 persistence, and limiting effects of the symptoms were not entirely consistent with the medical
23 evidence. (AR 26, 29-30). The ALJ noted that Plaintiff generally responded well to treatment
24 but had a history of noncompliance, further finding that there was little mention in the treating
25 record of reported medication side effects that Plaintiff was unable to tolerate, despite Plaintiff’s
26 claim he did not take all of his prescribed psychotropic medications because he did not want
27 negative side effects. (AR 29-30).

28 In finding the above residual functional capacity, the ALJ recounted the findings of the

1 physicians and medical professionals in the treating record, as well as the nonmedical opinions of
2 Plaintiff's sister, Araceli Mendoza, and Plaintiff's girlfriend, Reyna Dominguez. (AR 30-33).

3 At step four, the ALJ found little documented evidence of any substantial gainful activity
4 within the last fifteen years and determined that Plaintiff has no past relevant work. (AR 33).
5 The ALJ noted that Plaintiff admitted he stopped working in 2006 because he went to prison,
6 rather than due to functional difficulties arising from disabling impairments, suggesting that he
7 could have otherwise continued working and raising the question of whether he was unemployed
8 for reasons other than functional limitations. (AR 30). At step five, the ALJ determined, based
9 on testimony from a vocational expert, that Plaintiff could perform work that exists in significant
10 numbers in the national economy, such as garment folder, cleaner, and marker. (AR 33-34). The
11 ALJ made a finding of "not disabled" under section 1614(a)(3)(A) of the Social Security Act.
12 (AR 34).

13 Plaintiff filed a request for review on February 1, 2021, which was denied by the Appeals
14 Council on November 22, 2021. (AR 6, 191). After exhausting his administrative remedies,
15 Plaintiff brought the instant action on January 22, 2022 and seeks judicial review pursuant to 42
16 U.S.C. § 405(g). (Doc. 1). Plaintiff filed his motion for summary judgment on May 21, 2022.
17 (Doc. 14). Defendant filed their opposition and cross-motion for summary judgment on August
18 4, 2022. (Doc. 16).

19 **B. Medical Record and Hearing Testimony**

20 The relevant hearing testimony and medical record were reviewed by the Court and will
21 be referenced below as necessary to this Court's decision.

22 **II. STANDARD OF REVIEW**

23 A district court's review of a final decision of the Commissioner of Social Security is
24 governed by 42 U.S.C. § 405(g). The scope of review under § 405(g) is limited; the
25 Commissioner's decision will be disturbed "only if it is not supported by substantial evidence or
26 is based on legal error." *Hill v. Astrue*, 698 F.3d 1153, 1158 (9th Cir. 2012). "Substantial
27 evidence" means "relevant evidence that a reasonable mind might accept as adequate to support a
28 conclusion." *Id.* at 1159 (quotation and citation omitted). Stated differently, substantial evidence

1 equates to “more than a mere scintilla[,] but less than a preponderance.” *Id.* (quotation and
2 citation omitted). “It is such relevant evidence as a reasonable mind might accept as adequate to
3 support a conclusion.” *Healy v. Astrue*, 379 F. App’x 643, 645 (9th Cir. 2010). In determining
4 whether the standard has been satisfied, a reviewing court must consider the entire record as a
5 whole rather than searching for supporting evidence in isolation. *Id.*

6 In reviewing a denial of benefits, a district court may not substitute its judgment for that of
7 the Commissioner. “The court will uphold the ALJ’s conclusion when the evidence is susceptible
8 to more than one rational interpretation.” *Tommasetti v. Astrue*, 533 F.3d 1035, 1038 (9th Cir.
9 2008). Further, a district court will not reverse an ALJ’s decision on account of an error that is
10 harmless. *Id.* An error is harmless where it is “inconsequential to the [ALJ’s] ultimate
11 nondisability determination.” *Id.* (quotation and citation omitted). The party appealing the ALJ’s
12 decision generally bears the burden of establishing that it was harmed. *Shinseki v. Sanders*, 556
13 U.S. 396, 409-10 (2009).

14 **A. Applicable Legal Standards**

15 A claimant must satisfy two conditions to be considered “disabled” within the meaning of
16 the Social Security Act. First, the claimant must be “unable to engage in any substantial gainful
17 activity by reason of any medically determinable physical or mental impairment which can be
18 expected to result in death or which has lasted or can be expected to last for a continuous period
19 of not less than twelve months.” 42 U.S.C. § 1382c(a)(3)(A). Second, the claimant’s impairment
20 must be “of such severity that he is not only unable to do his previous work[,] but cannot,
21 considering his age, education, and work experience, engage in any other kind of substantial
22 gainful work which exists in the national economy.” 42 U.S.C. § 1382c(a)(3)(B).

23 The Commissioner has established a five-step sequential analysis to determine whether a
24 claimant satisfies the above criteria. *See* 20 C.F.R. § 416.920(a)(4)(i)-(v). At step one, the
25 Commissioner considers the claimant’s work activity. 20 C.F.R. § 416.920(a)(4)(i). If the
26 claimant is engaged in “substantial gainful activity,” the Commissioner must find that the
27 claimant is not disabled. 20 C.F.R. § 416.920(b).

28 If the claimant is not engaged in substantial gainful activity, the analysis proceeds to step

two. At this step, the Commissioner considers the severity of the claimant's impairment. 20 C.F.R. § 416.920(a)(4)(ii). If the claimant suffers from "any impairment or combination of impairments which significantly limits [his or her] physical or mental ability to do basic work activities," the analysis proceeds to step three. 20 C.F.R. § 416.920(c). If the claimant's impairment does not satisfy this severity threshold, however, the Commissioner must find that the claimant is not disabled. *Id.*

At step three, the Commissioner compares the claimant's impairment to impairments recognized by the Commissioner to be so severe as to preclude a person from engaging in substantial gainful activity. 20 C.F.R. § 416.920(a)(4)(iii). If the impairment is as severe or more severe than one of the enumerated impairments, the Commissioner must find the claimant disabled and award benefits. 20 C.F.R. § 416.920(d).

If the severity of the claimant's impairment does not meet or exceed the severity of the enumerated impairments, the Commissioner must pause to assess the claimant's "residual functional capacity." Residual functional capacity (RFC), defined generally as the claimant's ability to perform physical and mental work activities on a sustained basis despite his or her limitations (20 C.F.R. § 416.945(a)(1)), is relevant to both the fourth and fifth steps of the analysis.

At step four, the Commissioner considers whether, in view of the claimant's RFC, the claimant is capable of performing work that he or she has performed in the past (past relevant work). 20 C.F.R. § 416.920(a)(4)(iv). If the claimant is capable of performing past relevant work, the Commissioner must find that the claimant is not disabled. 20 C.F.R. § 416.920(f). If the claimant is incapable of performing such work, the analysis proceeds to step five.

At step five, the Commissioner considers whether, in view of the claimant's RFC, the claimant is capable of performing other work in the national economy. 20 C.F.R. § 416.920(a)(4)(v). In making this determination, the Commissioner must also consider vocational factors such as the claimant's age, education, and past work experience. *Id.* If the claimant is capable of adjusting to other work, the Commissioner must find that the claimant is not disabled. 20 C.F.R. § 416.920(g)(1). If the claimant is not capable of adjusting to other work, the analysis

1 concludes with a finding that the claimant is disabled and is therefore entitled to benefits. *Id.*

2 The claimant bears the burden of proof at steps one through four above. *Tackett v. Apfel*,
3 180 F.3d 1094, 1098 (9th Cir. 1999). If the analysis proceeds to step five, the burden shifts to the
4 Commissioner to establish that (1) the claimant is capable of performing other work; and (2) such
5 work “exists in significant numbers in the national economy.” 20 C.F.R. § 416.960(c)(2); *Beltran*
6 *v. Astrue*, 700 F.3d 386, 389 (9th Cir. 2012).

7 **B. Submission of Documents After the Hearing**

8 Social Security regulations require a claimant to inform the ALJ about or submit any
9 written evidence no later than five (5) business days before the date of the hearing. 20 C.F.R. §§
10 404.935(a), 416.935(a). If a claimant fails to meet this requirement, the ALJ “may decline to
11 consider or obtain the evidence,” unless certain exceptions apply. *Id.* Those exceptions include
12 an unusual, unexpected, or unavoidable circumstance beyond claimant’s control that prevented
13 them from informing the ALJ about or submitting the evidence earlier. 20 C.F.R. §§
14 404.935(b)(3), 416.935(b)(3). One example of such a circumstance is where a claimant has
15 “actively and diligently sought evidence from a source and the evidence was not received or was
16 received less than 5 business days prior to the hearing.” 20 C.F.R. §§ 404.935(b)(3)(iv),
17 416.935(b)(3)(iv). If a claimant has missed the deadline because of one of the listed exceptions,
18 the ALJ “will accept the evidence” if he or she has not yet issued the decision.” 20 C.F.R. §§
19 404.935(b), 416.1435(b).

20 “It is the burden of a claimant seeking DIB and SSI to present evidence of disability.
21 Although the [r]egulations are not intended to exclude relevant evidence – notably, the five-day
22 rule requires consideration of late evidence if any of a number of factors exist – they must (and
23 do) provide some limits on what ALJ’s are required to consider.” *Vickie M. v. Saul*, No. 2:19-
24 CV-01740-GJS, 2020 WL 1676624, at *5 (C.D. Cal. Apr. 6, 2020).

25 **C. Consultative Examinations**

26 It is the ALJ’s duty to investigate the facts and develop the arguments both for and against
27 granting benefits. *Armstrong v. Commissioner of Soc. Sec. Admin.*, 160 F.3d 587, 589 (9th
28 Cir.1998); 20 C.F.R. §§ 404.1512(d)-(f). This duty to develop the record is “especially important”

1 where, as here, the claimant alleges a mental impairment. *DeLorme v. Sullivan*, 924 F.2d 841, 849
 2 (9th Cir. 1991). This duty may require that the ALJ obtain additional information by, *inter alia*,
 3 contacting treating physicians, scheduling consultative examinations, or calling a medical expert.
 4 20 C.F.R. §§ 416.912(e)-(f), 416.919a. However, the ALJ's duty to develop the record attaches
 5 only when there is ambiguous evidence or when the record is inadequate to allow proper evaluation
 6 of the evidence. *Mayes v. Massanari*, 276 F.3d 453, 459-60 (9th Cir. 2001). A conflict in evidence
 7 is not the same as an ambiguity. *See, e.g., Kaur v. Kijakazi*, No. 1:22-cv-0697-JLT-CDB, 2023 WL
 8 6241821, at *2 (E.D. Cal. Sept. 26, 2023) (citing *Zargi v. Comm'r of Soc. Sec.*, No. CIV S-08-1677-
 9 CMK, 2009 WL 1505311, at *19 (E.D. Cal. May 27, 2009)). "Ambiguous evidence means
 10 incapable of explanation, while conflicts in the record can be confronted by the ALJ without
 11 additional evidence, including inconsistencies as resulting from plaintiff's lack of credibility." *Id.*
 12 (internal quotation and citation omitted).

13 The ALJ "has broad latitude in ordering a consultative examination. The government is
 14 not required to bear the expense of an examination for every claimant. Some kinds of cases,
 15 however, do normally require a consultative examination, including those in which additional
 16 evidence needed is not contained in the records of [the claimant's] medical sources, and those
 17 involving an ambiguity or insufficiency in the evidence [that] must be resolved." *Reed v.*
 18 *Massanari*, 270 F.3d 838, 842 (9th Cir. 2001) (citations and quotations omitted).

19 **III. ISSUES AND ANALYSIS**

20 Plaintiff seeks judicial review of the Commissioner's final decision denying his
 21 application for SSI. (Doc. 1). Plaintiff argues remand is warranted because: (1) the ALJ offered
 22 only a limited rationale for his findings regarding psychological impairments and the resulting
 23 disability determination, (2) the ALJ failed to admit evidence filed after the hearing, and (3) the
 24 ALJ failed to order a consultative examination which, Plaintiff claims, would have allowed a
 25 more objective analysis of his complaints relating to psychological impairments and resulting
 26 disability. (Doc. 14, 4-5). Plaintiff prays for review of "newly exhibited records" and a
 27 consultative examination, after consideration of which a new decision should be issued. *Id.* at 5.

28 ///

**A. Whether the ALJ Failed to Provide a Proper Basis for the Disability
Determination on Psychological Impairments**

Plaintiff asserts that the ALJ provided only a limited rationale as to the disability determination regarding psychological impairments. (Doc. 14 at 4).

In the reconsideration determination, Plaintiff was found to have the impairment of “12.04 – Depressive, Bipolar, and Related Disorders.” (AR 101-102). Listing 12.04 requires that Plaintiff must satisfy “Paragraph A” and either “Paragraph B” or “Paragraph C.” 20 C.F.R. Pt. 404, subpt. P, app. 1 § 12.04.

As described in section I above, the ALJ provided her reasoning in some detail as to why Plaintiff did not satisfy the “Paragraph B” criteria. (AR 24, 27-29). The ALJ found that Plaintiff has a moderate limitation in understanding, remembering, or applying information. (AR 24). The ALJ supported her finding by noting a wide range of daily tasks, found in the medical records, that Plaintiff could accomplish, such as preparing simple meals, doing household chores, shopping in store and via computer, going to the post office, and grocery store, and performing his activities of daily living without assistance. (AR 28).

The ALJ found that Plaintiff has a moderate limitation when interacting with others. (AR 24). The ALJ supported this determination by noting that Plaintiff could engage in the following: living with and maintaining positive relationships with family and long-term significant others, watching movies with his sister, maintaining at least some friendships, understanding and following spoken instructions, and responding appropriately at hearings and clinical appointments. (AR 28-29).

The ALJ found that Plaintiff has a mild limitation in concentrating, persisting, or maintaining pace. (AR 24). The ALJ cited Plaintiff’s treating records, noting that Plaintiff could count change, use checkbooks or money orders, engage in hobbies, exercise, watch TV for extended times, use a computer, and understand spoken instructions. (AR 29).

The ALJ found that Plaintiff has a mild limitation in managing himself. (AR 24). The ALJ noted that Plaintiff could present appropriately at the hearing and at clinical appointments throughout the record, walk and do push-ups, lift weights, engage in physical therapy, and handle

1 daily stressors associated with his condition and with changes in routine. (AR 29).

2 The ALJ extensively cited the primary mental health treating records in the file, (the Kern
3 Behavioral Health and Recovery Services records (Exhibit 4F)), in her discussion of her
4 “Paragraph B” findings. (AR 27-29). The ALJ determined that none of Plaintiff’s medically
5 determinable mental impairments caused more than moderate limitations in any of the “Paragraph
6 B” functional areas and that the severity of Plaintiff’s bipolar disorder impairments do not meet or
7 medically equal the criteria found in 20 C.F.R. Pt. 404, subpt. P, app. 1. (AR 24).

8 Additionally, the ALJ considered “Paragraph C” and determined that the evidence fails to
9 establish the presence of satisfying criteria, “given the claimant’s relatively intact daily activities
10 and capacity for adapting, as further discussed below.” (AR 24).

11 “Paragraph C,” subsection (1) requires a “highly structured setting that is ongoing that
12 diminishes the signs and symptoms of [Plaintiff’s] mental disorder.” 20 C.F.R. Pt. 404, subpt. P,
13 app. 1 § 12.04(C)(1). As recounted in section I, the ALJ found Plaintiff was able to “occasionally
14 drive (including driving himself to a consultative examination), take out the trash, pick up kids
15 toys, prepare simple meals such as sandwiches, generally help his mother with household chores
16 without help or encouragement, shop for necessities in stores and by computer about twice a
17 month for about 30 minutes at a time, perform his own activities of daily living without
18 assistance, and do errands such as going to the post office or grocery store without assistance”
19 (AR 28), as well as “live with family (at times including his mother, his sister, and five nieces and
20 nephews), maintain positive relationships with family members and a long-term significant other,
21 watch movies with his sister for about five hours a day, maintain at least some friendships and
22 talk to his friends on the phone every other day, shop in stores, get along with authority figures
23 without problem, and generally respond appropriately at the hearing and at clinical appointments
24 throughout the record, consistent with at most moderate difficulties interacting with others” (AR
25 28-29).

26 The ALJ provided substantial evidence as to why Plaintiff does not satisfy the requirement
27 of a “highly structured setting that is ongoing,” due to the activities of daily life that he regularly
28 engages in.

“Paragraph C,” subsection (2) requires that Plaintiff “have minimal capacity to adapt to changes in [Plaintiff’s] environment or to demands that are not already part of [Plaintiff’s] daily life.” 20 C.F.R. Pt. 404, subpt. P, app. 1 § 12.04(C)(2). Also as recounted in section I, the ALJ analyzed Plaintiff’s abilities regarding adapting and managing oneself, determining that Plaintiff “was able to handle daily stress associated with his condition and handle changes in routine well despite his difficulties, and the undersigned observed that he was able to generally present appropriately at the hearing and at clinical appointments throughout the record. This is consistent with at most mild difficulties adapting and managing oneself.” (AR 29). *See, e.g., Keller v. Kijakazi*, No. 3:22-CV-707-WVG, 2023 WL 6149902, at *7 (S.D. Cal. Sept. 19, 2023) (finding that ALJ did not err in analysis of “Paragraph C” criteria because adequate support and discussion of impairments were provided in a separate section of the decision). As such, the ALJ provided substantial evidence to conclude that Plaintiff did not satisfy either “Paragraph B” or “Paragraph C” of listing 12.04.

The Court, considering the record as a whole, finds that the ALJ presented substantial evidence sufficient to support her conclusions and, therefore, did not fail to provide a proper basis for the disability determinations regarding Plaintiff’s psychological impairments. *See e.g., Darrell H. v. Comm’r of Soc. Sec.*, No. C21-0228-SKV, 2021 WL 3856062, at *5 (W.D. Wash. Aug. 30, 2021) (“Because Plaintiff fails to establish that any [§ 416.1435(b)] exception applied, it was within the ALJ’s discretion to decline to accept the [belatedly submitted] evidence.”), *aff’d*, 2022 WL 12325226, at *1 (9th Cir. Oct. 21, 2022) (“The ALJ acted within his discretion when he did not accept the unexplained late filing and did not misapply 20 C.F.R. § 416.1435(b).”).

B. Whether the ALJ Failed to Properly Consider Records Submitted After the Hearing

Plaintiff asserts that, despite being granted permission to provide them, the ALJ failed to properly consider newly discovered psyche treatment records submitted after the hearing. (Doc. 14 at 5).

On December 17, 2019, after Plaintiff requested a hearing before an ALJ, the Social Security Administration sent Plaintiff a letter informing him about the ALJ hearing process, prior

1 to the scheduling of a date for the hearing. In that letter, Plaintiff was informed that: “You are
2 required to inform us about or submit all evidence known to you that relates to whether or not you
3 are blind or disabled. You must inform us about or give us evidence no later than five business
4 days before the date of your hearing. The ALJ may choose to not consider the evidence if you
5 fail to provide it timely.” (AR 125-127).

6 In the “Notice of Hearing” letter dated July 15, 2020, the Plaintiff was informed that the
7 hearing would be held on September 29, 2020, before ALJ Mary P. Parnow. (AR 140, 144). The
8 notice instructed Plaintiff as follows:

9 You are required to inform us about or submit all evidence known to you that
10 relates whether or not you are blind or disabled. **If you are aware of or have**
11 **more evidence, such as recent records, reports, or evaluations, you must**
12 **inform me about it or give it to me no later than 5 business days before the**
13 **date of your hearing. If you do not comply with this requirement, I may**
14 **decline to consider the evidence unless the late submission falls within a**
15 **limited exception.**

16 If you missed the deadline to inform us about or submit evidence, I will accept
17 the evidence if I have not yet issued a decision and you did not inform us about
18 or submit the evidence before the deadline because:

- 19 1. Our action misled you;
- 20 2. You had a physical, mental, educational, or linguistic limitation(s) that
21 prevented you from informing us about or submitting the evidence earlier;
22 or
- 23 3. Some other unusual, unexpected, or unavoidable circumstance beyond your
24 control prevented you from informing us about or submitting the evidence
25 earlier.

26 (AR 141-142) (emphasis in original). In Plaintiff’s letter brief prior to the hearing, dated
27 September 1, 2020, but stamped “received” on September 22, 2020, Plaintiff states there may be
28 additional records that he is in the process of obtaining, and asks that they be allowed entered as
exhibits even after the date of the hearing. (AR 332).

On October 8, 2020, nine days after the September 29 hearing, Plaintiff submitted fifteen
pages of records from Kern Behavioral Health and Recovery Services. The records were dated
December 2018 to April 2020. (AR 66-80). In the ALJ’s decision, she explains that the Plaintiff

1 informed her about this additional written evidence less than five business days before the
2 scheduled hearing date. She states the following:

3 At the hearing, the claimant's representative asked the undersigned to hold the
4 record open for recent Clinica Sierra Vista mental health records, and the
5 undersigned granted this request . . . Therefore, post hearing, the record was
6 held open for 14 days to receive these records and to decide whether to order a
7 psychological consultative examination. The claimant's representative did not
8 report other outstanding medical records. On October 8, 2020, however, the
9 claimant's representative instead submitted 15 pages of records from Kern
10 Behavioral Health and Recovery Services dated December 2018 to January
11 2020, a period significantly prior to the hearing date. These records are not the
recent mental health records from Clinica Sierra Vista of which the undersigned
had been notified, and the representative did not provide an explanation of why
these records were submitted late. The undersigned Administrative Law Judge
declines to admit this evidence because the requirements of 20 CFR
416.1435(b) are not met.

12 (AR 20-21). A review of the hearing transcript supports the ALJ's description. In brief, upon
13 being asked by the ALJ whether any new exhibits needed to be entered into evidence, counsel
14 for Plaintiff represented that he had been attempting since September 2, 2020, to acquire adult
15 mental health records from Clinica Sierra Vista, and needed additional time to obtain them. He
16 noted this was, in particular, because there did not seem to be any "psych condition" evaluations
17 in the record since 1993. The ALJ then agreed to hold the record open for the Clinica Sierra
18 Vista records for fourteen (14) days after the hearing. (AR 44-45).

19 The ALJ found Plaintiff did not provide a reason under 20 CFR § 416.1435 to accept the
20 records, as he did not provide any accompanying explanation or good cause for the late
21 submission. The ALJ expressly relied on the language of the aforementioned regulation:

22 There is little evidence that the claimant did not inform the undersigned about
23 or submit the evidence before the deadline because the agency's action misled
24 them. The claimant and his representative do not allege that the claimant had a
25 physical, mental, educational, or linguistic limitation(s) that prevented him
26 from informing the agency about or submitting the evidence earlier; or that
some other unusual, unexpected, or unavoidable circumstance beyond his
control prevented him from informing the agency about or submitting the
evidence earlier.

27
28 (AR 21). A review of the Kern Behavioral Health and Recovery Services records supports the

1 ALJ's contentions. (AR 66-80). They consist of 15 pages, with printing dates either on September
2 29 or September 30, 2020 and with the earliest date contained in the records falling in December
3 2018. (AR 68, 70-80). The ALJ states the latest date mentioned in the records as being in January
4 2020; however, an "end date" for a medication seems to fall in April 2020. (AR 69). However,
5 this is a harmless error and does not change the analysis, as even so, April 2020 is roughly five
6 months before the hearing date in late September 2020 and does not provide a basis to claim any
7 exception under 20 CFR § 416.1435.

8 Plaintiff provides no reasoning for why he began attempting to obtain these records as late
9 as September 2, 2020. Additionally, even if the records were from Clinica Sierra Vista as Plaintiff
10 represented at the hearing, that similarly would not result in an exception, as they would still long
11 predate the hearing and Plaintiff's failure to allege an exception would remain.

12 In a case before the Central District of California, counsel for plaintiff began seeking
13 medical records only after the hearing was scheduled and requested a formal subpoena only
14 weeks before the scheduled hearing date. Two days prior to the hearing, counsel for plaintiff
15 received a voluminous quantity of records, which he sought to be entered into evidence at the
16 hearing, and was denied by the ALJ. *See Vickie M.*, 2020 WL 1676624, at *4-5. The court
17 denied plaintiff's appeal, citing 20 C.F.R. § 404.935 regarding the late submission of evidence.
18 *Id.* The court stated that counsel "appears to have ignored his client's case almost completely for
19 nearly two years, only seeking a large mass of documents after the hearing before the ALJ was
20 scheduled. Counsel below was seeking, for the most part, old records...The fact that counsel
21 below waited until just a few weeks before the hearing to request a subpoena is fatal to
22 [p]laintiff's diligence argument." *Id.* at *4. In the instant action, Plaintiff has no claim to any
23 such diligence argument and Plaintiff appears to have delayed in requesting old records.

24 The ALJ cited the appropriate regulation and complied with the Commissioner's internal
25 guidance on the matter, which provides that "if an ALJ does not find that the circumstances in 20
26 CFR 404.935(b) and 416.1435(b) apply, the ALJ will not exhibit the untimely evidence and will
27 explain his or her reason for not considering it." The guidance also provides that "[t]he ALJ can
28 provide these reasons on the record at the hearing, in a written ruling that the ALJ exhibits, or in

the ALJ’s decision.” Consistent with agency guidance, the ALJ may briefly explain in the text of the decision that additional evidence was submitted, “specifically identifying the evidence, usually by source, date, and number of pages,” find that “the claimant did not establish a reason under 20 CFR 404.935 and 416.1435 for not informing the agency about or submitting it within the required timeframes,” and decline to consider the evidence.³

The Court finds that the ALJ did not err in refusing to admit the late-submitted Kern Behavioral Health and Recovery Services records. Plaintiff did not provide the adequate basis under 20 C.F.R. § 416.1435(b) to admit the records, as they were submitted nine days after the hearing. Plaintiff received adequate notice and did not demonstrate diligence, being informed of the deadline to submit all evidence at least five business days before the hearing, in both the initial letter informing him about the hearing process and the subsequent letter setting his hearing date.

C. Whether the ALJ Erred in Declining to Schedule a Consultative Examination

Plaintiff asserts that the ALJ erred in declining to schedule a psychiatric consultative examination. (Doc. 14 at 5). On September 1, 2020, Plaintiff requested a consultative examination “in [p]syche.” Plaintiff stated that the “records of disability contains [sic] plenty of evidence of diagnoses and treatment, but the limitations are not fully vetted.” (AR 325). Plaintiff repeated the request in his letter brief prior to the hearing with the ALJ (dated September 1, 2020, but stamped “received” on September 22, 2020), stating that the consultative examination was needed to address any additional disability stemming from his bipolar disorder. (AR 331). Plaintiff raised the issue during the hearing with the ALJ on September 29, 2020, as evidenced in the hearing transcript, due to a lack of “any evaluations of psych condition in the record until going back until [sic] 1993”; the ALJ stated she would consider the request and provide her decision in writing. (AR 45). In her decision on December 7, 2020, the ALJ stated that she “does not find it necessary based on the record ... which reflects minimal abnormal mental health findings.” (AR 21). She then stated Plaintiff’s counsel “has not submitted the outstanding recent

³ See HALLEX, Admitting Evidence Submitted Less Than Five Business Days Before the Hearing or At or After the Hearing, § I-2-6-59(C) (May 1, 2017), available at https://www.ssa.gov/OP_Home/hallex/I-02/I-2-6-59.html (last visited Nov. 8, 2024).

1 mental health records from Clinica Sierra Vista.” *Id.*

2 Plaintiff raised the issue again on February 1, 2021, in his correspondence to the Appeals
3 Council seeking review of the ALJ’s decision. In that document, Plaintiff states the following:

4 Most importantly however is the Court stated that the willingness to order a
5 consultative examiner [sic] was predicated on additional psyche records that
6 claimant ask [sic] to be allowed for at the time of the hearing. Yet nothing about
7 claimant’s 9-1-20 request was predicated on these records. Rather this was
8 requested because the record did not establish a good record of any psyche
9 disability upon which the Court could rely.

9 (AR 337). Plaintiff uses identical language in the instant motion for summary judgment. (Doc.
10 14 at 5).

11 On consideration of Plaintiff’s initial application, physician Francis T. Greene provided
12 that a light RFC is reasonable. (AR 85-90). He does not mention Plaintiff’s mental health in his
13 findings. On August 7, 2019, upon reconsideration of Plaintiff’s SSI application, disability
14 adjudicator/examiner J. Lee spoke to Plaintiff regarding his medical issues. In his description of
15 the conversation, J. Lee notes that Plaintiff “reported he did receive medication for bipolar
16 [disorder]. He said he was taking Effexor. He is taking neurotin for his anxiety and anger
17 problems.” (AR 98). “Neurotin” is likely a misspelling of the drug Neurontin. The initial
18 application decision does not mention receiving the Kern Behavioral Health and Recovery
19 Services records but the reconsideration decision does. (AR 99).

20 The reconsideration findings mention “[d]iscovered impairments: bipolar d/o; anxiety;
21 anger problems.” *Id.* The findings review Plaintiff’s mental health records in some detail, in a
22 chronological format from February 26, 2018, to September 18, 2019. (AR 99-101). In the final
23 recommendations and conclusions section, physician M.D. Morgan mentions that Plaintiff did not
24 allege any psychological impairments in the initial application but, upon speaking to Plaintiff by
25 phone, noted Plaintiff reported being on medication for bipolar disorder and Neurontin for anxiety
26 and anger problems; Dr. Morgan then notes the evidence relating to mental health is consistent
27 with a non-severe determination. (AR 101). “2960 – Depressive, Bipolar and Related Disorders”
28 is listed under the impairment section of the reconsideration determination, noting it as non-

1 severe; below this it is marked as “12.04 – Depressive, Bipolar, and Related Disorders” under the
2 “A” and “B” criteria. Under “Paragraph A,” it is stated that the impairment “does not precisely
3 satisfy the diagnostic criteria above”; under “Paragraph B,” Plaintiff is determined to have mild
4 limitations in all four subcategories. The determination states that “C” criteria is not established
5 under the evidence, and it was signed by Dr. Morgan on September 24, 2019. (AR 101-102).

6 In her decision, the ALJ stated she did not find a consultative examination
7 necessary based on the record. (AR 21). The ALJ extensively cited and discussed
8 records that reflected minimal abnormal mental health findings and weighed functional
9 RFC evaluations. Plaintiff fails to identify any record inconsistency that would require
10 an ALJ to further develop the record. In short, where, as here, the record demonstrates
11 the ALJ properly considered the record as a whole, including function-by-function RFC
12 examinations by Drs. Roger Wagner and D. Morgan (AR 30-31), the ALJ properly
13 exercised her discretion to decline to order a consultative examination. *See Albrecht v.*
14 *Astrue*, No. 1:11-cv-01319 GSA, 2012 WL 3704798, at *12 (E.D. Cal. Aug. 27, 2012)
15 (“a consultative examination regarding Plaintiff’s physical impairments was not
16 necessary here because the existing evidence was sufficient to support the ALJ’s
17 determination and such an exam was not needed to resolve an inconsistency”); *Garcia v.*
18 *Astrue*, No. C 08-3833 MHP, 2010 WL 1293376, at *5 (N.D. Cal. Mar. 31, 2010)
19 (finding no error by ALJ in declining to order consultative examination where his review
20 of the record including function-by-function RFC examinations) (distinguishing *Reed*,
21 270 F.3d at 842).

22 Further, as discussed above in subsection (B), the ALJ did not err in refusing to admit the
23 late-filed evidence from Kern Behavioral Health and Recovery Services. The ALJ considered
24 other records from Kern Behavioral Health and Recovery Services that were timely submitted by
25 Plaintiff and entered into evidence, consisting of ninety-three pages. (AR 420-512). Mental
26 health diagnoses, symptoms, and treatment plans are discussed numerous times over many
27 appointments, including depression, anxiety, anger, substance abuse, excessive energy, trauma,
28 suicide attempts, and bipolar disorder diagnosis. (AR 424-425, 428-432, 438, 440-441, 443, 449,

1 452, 454, 460-462, 471, 478-479, 481, 484, 487-488, 490, 493, 496-498, 501, 504-505). The ALJ
2 extensively cited these records (as Exhibit 4F) in her discussion of her “Paragraph B” findings.
3 (AR 27-29). The ALJ determined that none of Plaintiff’s medically determinable mental
4 impairments caused more than moderate limitations in any of the “Paragraph B” functional areas
5 and that the severity of Plaintiff’s bipolar disorder impairments do not meet or medically equal
6 the criteria found in 20 C.F.R. Pt. 404, subpt. P, app. 1. (AR 24).

7 Even if the ALJ had admitted the late-filed Kern Behavioral Health and Recovery Services
8 records, they are substantially similar to the evidence already in the record. They do not appear to
9 provide any materially new or different evidence, nor do they contradict the findings of other
10 physicians. This case does not exhibit a lack of needed medical records nor an insufficiency in
11 the medical records provided, nor does it present a case of ambiguous or contradictory evidence.
12 *Cf. Reed*, 270 F.3d at 842.

13 The Court finds that the ALJ did not err in declining to order a consultative examination.

14 **IV. CONCLUSION**

15 For the reasons stated above, the Court ORDERS as follows:

- 16 1. Plaintiff’s Motion for Summary Judgment (Doc. 14) is DENIED;
- 17 2. Defendant’s Cross-Motion for Summary Judgment (Doc. 16) is GRANTED; and
- 18 3. The Clerk of the Court shall enter judgment in favor of Defendant, terminate any
19 deadlines, and close this case.

20 IT IS SO ORDERED.

21 Dated: **November 8, 2024**

22 
UNITED STATES MAGISTRATE JUDGE